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IN THE

Supreme Court of the United States

OCTOBER TERM 1968

No. 482

JOHN J. MORETTI,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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John J. Moretti prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of New Jersey entered on July 8, 1968 (Appendix A).

Opinion Below

The opinion of the Supreme Court of the State of New Jersey is included in Appendix B appended hereto. Said opinion has not as yet been reported.

Jurisdiction

The judgment of the Supreme Court of New Jersey was entered on July 8, 1968. Appendix A. The jurisdiction is

invoked under 28 U.S.C., Sec. 1257 (3) since the petitioners claims that the abortion statute of the State of New Jersey is repugnant to the Constitution and laws of the United States.

Questions Presented

1. Is New Jersey's abortion statute unconstitutional?

2. If two or more persons agree to perform an abortion on a woman, who it turns out is not pregnant, can they be said to have conspired to commit a crime?

Constitutional Provisions and Statutes Involved

The case involves the Fourteenth Amendment to the United States Constitution and New Jersey's abortion stattue N.J.S. 2A:87-1.

The New Jersey Statute involved is as follows:

N.J.S. 2A:87-1, causing miscarriage: Increased penalty if death results.

Any person who, maliciously or without lawful justification, with intent to cause or procure the miscarriage of a pregnant woman, administers or prescribes or advises or directs her to take or swallow any poison, drug, medicine or noxious thing, or uses any instrument or means whatever, is guilty of a high misdemeanor.

If as a consequence the woman or child shall die, the offender shall be punished by a fine of not more than $5,000, of by imprisonment for not more than 15 years, or both.

Statement of the Case

Petitioner John J. Moretti, a Marietta Schmidt, and a Lawrence Gianettino, were convicted in the Essex County New Jersey Court of conspiracy to commit an abortion on Sylvia Swidler. Gianettino died shortly after the trial.

Moretti and Schmidt appealed their convictions to the Appellate Division of the New Jersey Superior Court who by a two to one decision affirmed the conviction, they appealed this decision to the New Jersey Supreme Court who again affirmed the conviction.

The petitioner for the purposes of this petition accepts the finding of facts set forth in the opinion of Proctor, J. for the New Jersey Supreme Court as a fair statement of the facts.

This statement is contained in Appendix B and is as follows:

> "On the evidence the jury could find that Mrs. Schmidt arranged with Moretti, a physician, to have an abortion performed on Mrs. Swidler. The abortion was to be performed by Gianettino, an inspector for the New Jersey State Board of Barber Examiners. Unknown to the defendants, Mrs. Swidler was a special investigator for the Essex County Prosecutor's Office. Gianettino appeared at about eleven o'clock one evening at the Swidler home pursuant to an appointment with Mrs. Swidler. She paid him $600 in marked money and they went upstairs to her bedroom where the abortion was to be performed. As Gainettino removed instruments to perform the abortion from a bag he had brought with him, the police who had been secreted in the house arrested him. The State concedes that Mrs. Swidler was not pregnant."

REASONS FOR GRANTING THE WRIT

POINT I

New Jersey's Abortion Statute is Unconstitutional

The statute here involved namely N.J.S. 2A-87-1 is so vague and indefinite that it suffers a constitutional infirmity. It uses the words "without lawful justification" without defining the meaning of these words. By failing to define the meaning of the term used no one could possibly tell when an abortion would or would not be justified.

Ashton v. *Kentucky,* (1966) 384 U. S. 1[illegible].

We adopt as part of our argument the words of the New Jersey Chief Justice in his partial desent in the case of *Gleitman* v. *Cosgrove,* 49 N. J. 22 which reads as follows:

> "I have difficulty with the constitutionality of the abortion statute, at least as it would be applied here. The statute, N.J.S.A. 2A:87-1, makes guilty of a high misdemeanor any person who 'without lawful justification' does any of the forbidden things with the intent to cause a miscarriage. The penalty is severe, the maximum imprisonment being seven years, N.J.S.A. 2A:85-6, unless 'the woman or child shall die,' in which event the imprisonment may be for 15 years, N.J.S.A. 2A:87-1. The statute, however, does not define 'lawful justification'; it does not say what fact—medical, sociological or economic—shall be justification.
>
> We are not dealing with deligation of legislative power to administrative agencies, as to which in some situations the Legislature may leave a problem to an agency for detailed solution. See *Shelton College* v. *State Board of Education,* —— N. J. ——

(1967). Nor are we dealing with an offense which defies perfect definition to that there inevitably remain marginal areas in which one who enters is nevertheless conscious of a risk. See *Boyce Motor Lines* v. *United States,* 342 U. S. 337, 340, 96 L. ed. 367, 371 (1952). As to the subject before us, it is a simple matter to tick off the specific situations and to state the ones in which 'lawful justification' shall be found. Thus we readily know the question is whether 'lawful justification' should exist (1) if there is a substantial risk to the life of the mother; or (2) if there is a substantial risk to the physical or mental health of the mother; or (3) if there is a like risk that the child will be born with grave physical or mental defect; or (4) if the pregnancy resulted from incest or rape (common law or statutory); or (5) if the mother is unmarried; or (6) if there will be economic or sociologic hardship; or (7) if the mother consents, for any or no reason. *The Model Penal Code,* Sec. 230.3 (Proposed Official Draft, May 4, 1962), states specifically what constitutes justification, and lists essentially the first four factual patterns I have just set forth. Thus there is no reason why a legislature could not itself say what shall constitute justification.

There are two constitutional facets to legislative vagueness or ambiguity. One concerns the individual, who is entitled by due process to a reasonably explicit warning as to what he may not do. The other concerns the division of responsibility between the legislative and judicial branches of government, for although, I have no doubt, the judiciary inevitably has a creative role in deciding civil controversies, I do not believe it has a like responsibility with respect to criminal liability. As to that sub-

ject, it is the Legislature which should decide what conduct shall be punishable, and although the judiciary should labor to find the legislature intent and to sustain it without constitutional bounds, it is something else to permit the Legislature to pass the policy decision to the judiciary. The point would be plain if the statute recited in so many words that the legislators were unable to agree upon what ought to be justification for a consensual abortion, and being thus unable to agree, the policy problem is assigned to the Supreme Court of the State with the hope that a majority of the Court will work it out. A delegation, with such frankness, would, I am sure, be refused by the Court, and yet the issue is the same whenever a court is unable to discover *what the Legislature intended* and must therefore read into the statute what the judge thinks the legislators ought to have agreed upon if they had his wisdom and courage. • • •

I have not overlooked the possibility that the Legislature meant by 'lawful justification' to refer to the justification available with respect to the common-law crime and thus spoke with specificity. I think that thesis cannot be accepted.

The common-law crime had a different object in view. The common-law offense was designed to protect the life of the fetus, and upon the postulate that life began when the fetus stirred in the mother's womb, it was an abortion thereafter which alone was criminal. *State* v. *Cooper*, 22 N. J. L. 52 (Sup. Ct. 1849). The statute, which was enacted in 1849 (L. 1849, p. 266), the year of the *Cooper* decision, had a different, or at least still another, objective; it was to protect the pregnant woman in her life and

her health, and to that end the statute made the abortion a crime on the part of third persons, whether the child was quick or not. • • •

The statutory objective being different, we ought not to assume that the Legislature meant by 'lawful justification' to refer to the justification the common law devised with respect to a common-law offense created to serve another value."

The statute here involved in its use of the term "without justification" is so clearly indefinite that no one could possibly know what is meant by this language. In view of the fact that this is a criminal case and the statute must be strictly construed in favor of the defendants it must of necessity be declared unconstitutional.

On November 20, 1967 the Supreme Court decided the case of *State* v. *Baird*, 50 N. J. Sup. Ct. 380 and in the concurring opinion of Chief Justice Weintraub and Justices Francis and Goldman, the following appears:

"I agree the conviction should be reversed but for the reason that the statute is invalid. • • • The phrase (without just cause) drains the statute of any discernible legislative decision with respect to contraception • • • (and) emptied the statute of all legislative direction. • • •

"The Court should not accept the task of supplying content to this statute. I suspect that when this court completes the process of 'interpretation,' there will be precious little left of the measure. But meanwhile the citizen will be restrained by a statute so obscure in its penal interdiction that he cannot act without coming first to us to be assured of the safety of his course. The public interest would

be better served by insisting upon a definitive legislative judgment. To that end, I would hold the statute invalid."

The unconstitutionality of the statute is clearly pointed out because of the fact that the terms "without lawful justification", and "without just cause" are identical.

POINT II

No one can be convicted of a charge of conspiracy to commit an abortion unless the woman who is to be the subject of the act is pregnant.

The New Jersey Supreme Court found; the prosecutor conceded and Mrs. Swidler testified that she was not pregnant at the time the events which were the subject matter of the case occurred.

The basis of a charge of conspiracy is the corrupt agreement however for the agreement to be unlawful it must be one whereby the parties to it are to commit a crime. If the act agreed to be done is impossible then there could be no unlawful agreement.

Ventmiglia v. *U. S.*, 242 F. 2d 620 at pp. 624-627 (C. C. A. 4th 1957);
O'Malley v. *U. S.*, 227 F. 2d 332 at p. 335 (C. C. A. 1st 1955);
Woo Wai v. *U. S.*, 223 F. 413 at p. 415 (C. C. A. 9th 1915);
O'Kelley v. *U. S.*, 116 F. 2d 966 at p. 968 (C. C. A. 8th 1941);
State v. *Meisch*, 86 N. J. Super. 279 (App. Div. 1965).

On the same subject the New Jersey Supreme Court in an opinion by Justice Burling in the case of *In re Vince*, 2 N. J. 443 at p. 449-451 decided in 1949 had the following to say:

> "Since the respondent was not quick with child at the time of the alleged abortion she cannot be indicted for the common law crime or for conspiracy to commit common law abortion and any claim of privilege grounded upon the supposition that she can be so indicted is without merit."

New Jersey's conspiracy statute N.J.S. 2A:98-1 provides that if any two or more persons conspire to commit a crime they are guilty of the crime of conspiracy.

Our abortion statute provides that any person who maliciously or without lawful justification with intent to cause or procure the miscarriage of a pregnant woman by any means whatever is guilty of a high misdemeanor.

In order for one to be guilty of the crime of conspiracy the agreement must be to commit a crime.

In order to be able to be found guilty of a violation of the abortion statute the woman must be pregnant.

If the woman was not pregnant one could not violate the statute.

It follows therefore that if the woman proposed to be aborted is not pregnant then there could not be an agreement to commit a crime.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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